

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

RAYTHEON COMPANY] CASE NO. 4:07CV109
VS.] 10 AM, NOVEMBER 18, 2008
INDIGO SYSTEMS CORP., ET AL] PLANO, TEXAS

REPORTER'S TRANSCRIPT OF TELECONFERENCE RE PRETRIAL SCHEDULING

VOLUME 1 OF 1, PAGES 1 THROUGH 39

THE HONORABLE RICHARD SCHELL, U.S. DISTRICT JUDGE, PRESIDING

PROCEEDINGS REPORTED USING COMPUTERIZED STENOTYPE,
TRANSCRIPT PRODUCED USING COMPUTER-AIDED TRANSCRIPTION.

[COURT REPORTER'S NOTES 20081118, 10 AM, TUESDAY,
NOVEMBER 18, 2008, PLANO, TEXAS, U.S. DISTRICT JUDGE RICHARD
SCHELL PRESIDING]

APPEARANCES:

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FOR THE DEFENDANTS INDIGO AND FLIR:

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7

10:05AM 8 THE COURT: CAN YOU HEAR ME?

10:05AM 9 MR. SIEBMAN: YES, JUDGE, WE CAN.

10:05AM 10 THE COURT: OKAY. GOOD.

10:05AM 11 LET ME CALL THE CASE AND THEN CHECK OFF WHO IS ON
10:05AM 12 THE LINE. THIS CASE IS STYLED "RAYTHEON COMPANY VERSUS INDIGO
10:05AM 13 SYSTEMS CORPORATION AND FLIR SYSTEMS, INC.," CASE NUMBER
10:05AM 14 4:07CV109.

10:05AM 15 AND I SHOULD HAVE ON THE LINE FOR RAYTHEON ROSS
10:06AM 16 CUNNINGHAM. ARE YOU THERE, MR. CUNNINGHAM?

10:06AM 17 MR. CUNNINGHAM: YES, SIR.

10:06AM 18 THE COURT: AND YOU ARE GOING TO BE SPEAKING FOR
10:06AM 19 RAYTHEON, IS THAT CORRECT?

10:06AM 20 MR. CUNNINGHAM: NO, SIR, JOE KENDALL WILL BE
10:06AM 21 SPEAKING ON BEHALF OF RAYTHEON.

10:06AM 22 THE COURT: OKAY. ALL RIGHT.

10:06AM 23 MR. KENDALL, YOU ARE THERE?

10:06AM 24 MR. KENDALL: YES, YOUR HONOR.

10:06AM 25 THE COURT: OKAY. AND KEITH RUTHERFORD. IS KEITH

10:06AM 1 RUTHERFORD THERE? NO. OKAY.

10:06AM 2 ALL RIGHT. FOR THE DEFENDANTS FLIR AND INDIGO, IS
10:06AM 3 CLYDE SIEBMAN ON THE LINE?

10:06AM 4 MR. SIEBMAN: YES, YOUR HONOR.

10:06AM 5 THE COURT: OKAY. AND IS MR. GARNER ON THE LINE?

10:06AM 6 MR. GARNER: YES, YOUR HONOR.

10:06AM 7 THE COURT: OKAY.

10:06AM 8 VOICE: HELLO?

10:06AM 9 THE COURT: AND IS BOB STEINBERG ON THE LINE?

10:06AM 10 MR. STEINBERG: YES, YOUR HONOR.

10:06AM 11 THE COURT: OKAY. AND IS MICHAEL COLLINS ON THE
10:06AM 12 LINE?

10:06AM 13 MR. COLLINS: YES, I AM, YOUR HONOR.

10:06AM 14 THE COURT: OKAY. DID SOMEONE ELSE JUST JOIN US?

10:06AM 15 MR. RUTHERFORD: JUDGE SCHELL, THIS IS KEITH
10:06AM 16 RUTHERFORD. SORRY, MY PHONE CUT OUT THERE FOR A SECOND.

10:06AM 17 THE COURT: ALL RIGHT. I THINK THAT'S EVERYONE
10:06AM 18 THEN.

10:07AM 19 OKAY. LET'S SEE, MR. SIEBMAN, ARE YOU GOING TO BE
10:07AM 20 SPEAKING FOR THE DEFENDANTS?

10:07AM 21 MR. SIEBMAN: YES, YOUR HONOR.

10:07AM 22 THE COURT: OKAY.

10:07AM 23 I RECEIVED THE LETTER FROM MR. SIEBMAN DATED
10:07AM 24 NOVEMBER 17TH, 2008, CONTAINING THE REQUEST BY THE DEFENDANTS
10:07AM 25 TO VACATE THE PRETRIAL SUBMISSION DEADLINES IN THE--I GUESS THE

10:07AM 1 MOST-RECENT ORDER TO EXTEND DOCKET-CONTROL DEADLINES WHICH I
10:07AM 2 SIGNED NOVEMBER 4TH OF 2008, AND THE DEFENDANTS' REQUEST TO
10:07AM 3 EXTEND THE DEADLINE FOR RESPONDING TO PENDING MOTIONS FOR ONE
10:08AM 4 WEEK AND TO RESTYLE THE FINAL PRETRIAL CONFERENCE COMING UP
10:08AM 5 THIS THURSDAY AS A STATUS AND RESCHEDULING CONFERENCE.

10:08AM 6 I ALSO RECEIVED THE LETTER FROM MR. CUNNINGHAM DATED
10:08AM 7 NOVEMBER 17TH RESPONDING TO MR. SIEBMAN'S LETTER AND STATING
10:08AM 8 THE PLAINTIFF'S OPPOSITION TO POSTPONING ANY OF THE AGREED
10:08AM 9 DEADLINES IN THE NOVEMBER 4TH DOCKET-CONTROL ORDER.

10:08AM 10 SO I GUESS THE QUESTION IS: WHAT WOULD YOU-ALL LIKE
10:08AM 11 TO DO? I KNOW YOU ARE WAITING FOR ME ON A NUMBER OF MOTIONS.
10:08AM 12 I THINK JUST IN THE MONTH OF NOVEMBER I'VE RECEIVED 13 MORE
10:09AM 13 MOTIONS. THOSE ARE NOT RIPE. BUT THE ONES THAT ARE RIPE
10:09AM 14 INCLUDE THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, ALSO THE
10:09AM 15 DEFENDANTS' MOTION FOR SANCTIONS, FOR SPOLIATION OF EVIDENCE.

10:09AM 16 THEN RAYTHEON HAS A MOTION TO DETERMINE WAIVER OF
10:09AM 17 PRIVILEGE. IS THAT MOTION STILL URGED, MR. KENDALL?

10:09AM 18 MR. KENDALL: YOUR HONOR, I'LL HAVE TO DEFER TO
10:09AM 19 MR. CUNNINGHAM ON THAT.

10:09AM 20 THE COURT: OKAY.

10:09AM 21 MR. CUNNINGHAM: YES, YOUR HONOR, IT IS.

10:09AM 22 THE COURT: OKAY. ALL RIGHT. THEN RAYTHEON HAS
10:09AM 23 ALSO FILED A MOTION FOR LEAVE TO SUPPLEMENT PATENT-INFRINGEMENT
10:09AM 24 CONTENTIONS, AND I KNOW YOU NEED A RULING ON THAT.

10:09AM 25 THEN THE DEFENDANTS HAVE FILED A MOTION TO COMPEL

10:10AM 1 DISCOVERY REGARDING MISAPPROPRIATION AND DAMAGES, AND A MOTION
10:10AM 2 TO COMPEL.

10:10AM 3 AND ALSO RAYTHEON HAS FILED A MOTION TO STRIKE THE
10:10AM 4 DEFENDANTS' ANSWER TO AN AMENDED COMPLAINT, IT LOOKS LIKE.

10:10AM 5 ANYWAY--AND I HAVEN'T GIVEN YOU MY CLAIM CONSTRUCTION.
10:10AM 6 AND IT'S ALL BECAUSE I HAVEN'T HAD TIME.

10:10AM 7 WHAT--I'M NOT SURE, BUT I GUESS I NEED TO LET YOU
10:10AM 8 SPEAK FIRST AS TO WHETHER YOU CAN GO FORWARD ON THIS CASE IN
10:10AM 9 JANUARY WITHOUT ME RULING PRETTY QUICKLY ON A NUMBER OF THESE
10:10AM 10 MOTIONS THAT I HAVE JUST GONE OVER AS WELL AS GIVING YOU MY
10:11AM 11 CLAIM CONSTRUCTION.

10:11AM 12 MR. SIEBMAN: YOUR HONOR, CLYDE SIEBMAN. I CAN
10:11AM 13 SPEAK TO THAT IF THE COURT WOULD LIKE.

10:11AM 14 THE COURT: OKAY.

10:11AM 15 MR. SIEBMAN: THAT WAS REALLY THE BASIS FOR OUR
10:11AM 16 LETTER IS THAT IT'S OBVIOUS TO US THAT--THAT THE CASE CAN'T BE
10:11AM 17 READY REALISTICALLY BY JANUARY. NOT ONLY IN THE CONTEXT OF THE
10:11AM 18 PENDING ISSUES, BUT UNDER THE NEW--EVEN UNDER THIS NEW SCHEDULE
10:11AM 19 IF YOU--IF EVERYONE TAKES THE MAXIMUM AMOUNT OF TIME THAT THEY
10:11AM 20 WOULD HAVE UNDER THE LOCAL AND FEDERAL RULES TO FILE THE
10:11AM 21 VARIOUS MOTIONS, RESPONSES AND REPLIES, THE COURT'S GONNA BE
10:11AM 22 FACED WITH AN ADDITIONAL NUMBER OF DAUBERT MOTIONS AND MOTIONS
10:11AM 23 FOR SUMMARY JUDGMENT ON THE DAMAGES ISSUES IMMEDIATELY BEFORE
10:11AM 24 TRIAL OR ON THE--ON THE--ON THE DAY OF TRIAL, POSSIBLY EVEN--
10:11AM 25 EVEN AFTER JANUARY 20TH, THE DEADLINE WOULD EXPIRE. AND SOME

10:12AM 1 OF THOSE ARE GONNA BE VERY NEEDY--AT LEAST THE ONES THAT WE'RE
10:12AM 2 GONNA FILE ON THE DAMAGES, WE THINK THAT THE DAMAGES ARE VERY
10:12AM 3 QUESTIONABLE AND THAT THE DAMAGE THEORIES ARE WEAK, AND WE'RE
10:12AM 4 GONNA HAVE SOME VERY SUBSTANTIVE MOTIONS ON THE DAMAGES. AND
10:12AM 5 UNDER THIS CURRENT SCHEDULE I DON'T SEE ANY WAY THAT THE COURT
10:12AM 6 CAN--THAT WE CAN EXPECT THE COURT FAIRLY TO--WHAT I'M SUGGEST-
10:12AM 7 ING IS IT'S NOT FAIR TO THE COURT FOR US TO EXPECT THAT THE
10:12AM 8 COURT CAN RULE ON THE VOLUME OF MOTIONS THAT HAVE BEEN FILED
10:12AM 9 AND THAT ARE GONNA BE FILED AND STILL MAINTAIN A REALISTIC
10:12AM 10 EXPECTATION THAT WE'RE GONNA MAINTAIN A JANUARY 20TH TRIAL
10:12AM 11 DATE. WE REALLY THOUGHT THAT THOSE ISSUES COULD BE DISCUSSED
10:12AM 12 ON THURSDAY. THE REASON THAT WE FILED THIS LETTER AND BROUGHT
10:12AM 13 THIS TO THE COURT'S ATTENTION IN ADVANCE OF THURSDAY IS THAT IN
10:12AM 14 WORKING THROUGH THE WORK THAT WE HAVE ON OUR PLATE IT'S GONNA
10:13AM 15 BE VIRTUALLY IMPOSSIBLE OR VERY, VERY DIFFICULT TO THOROUGHLY
10:13AM 16 COMPLETE THE WORK THAT WE HAVE TO DO UNDER THE CURRENT SCHEDULE
10:13AM 17 EVEN FOR THURSDAY WITH RESPECT TO THE JOINT FINAL PRETRIAL
10:13AM 18 ORDER, RESPONSES ON THE VARIOUS MOTIONS THAT ARE PENDING.
10:13AM 19 AND RATHER THAN CONTINUE WHAT WE CONSIDER TO BE SOMEWHAT OF
10:13AM 20 A CHARADE IN TERMS OF--OF ATTEMPTING WHAT'S IMPOSSIBLE, WE
10:13AM 21 THOUGHT IT MADE MORE SENSE TO COME TO THE COURT AND SAY,
10:13AM 22 "YOU KNOW, LET'S--LET'S RELIEVE OURSELVES, BOTH SIDES, OF THE
10:13AM 23 RESPONSIBILITY TO DO THIS FINAL JOINT PRETRIAL ORDER WHEN IN
10:13AM 24 FACT IT'S GONNA NOT BE ANYTHING LIKE A JOINT FINAL PRETRIAL
10:13AM 25 ORDER NO MATTER WHAT WE DO." FOR EXAMPLE, PENDING CURRENTLY

10:13AM 1 THERE ARE--EVEN THE EXPERT DEPOSITIONS HAVE NOT BEEN TAKEN.
10:13AM 2 THE DEFENDANTS' EXPERT WALTER BRADDOCK HAS HAD A NUMBER OF
10:14AM 3 ISSUES WITH RESPECT TO HEALTH, DEATHS IN THE FAMILY OR
10:14AM 4 ILLNESSES IN THE FAMILY--I DON'T REMEMBER IF IT WAS ILLNESSES
10:14AM 5 OR DEATHS IN THE FAMILY, HE'S HAD OTHER COMMITMENTS, AND WE'RE
10:14AM 6 NOT EVEN GONNA BE ABLE TO TAKE THEIR EXPERT UNTIL AFTER THE
10:14AM 7 JOINT FINAL PRETRIAL ORDER. THERE HAVE JUST BEEN ALL SORTS OF
10:14AM 8 DELAYS THAT HAVE PUSHED THINGS BEYOND THAT DATE AND IT'S JUST
10:14AM 9 NOT PRACTICAL TO--TO--TO PRESENT A GENUINE FINAL JOINT PRETRIAL
10:14AM 10 ORDER WITH ALL THAT'S OUTSTANDING AND ALL THAT'S ON OUR PLATE
10:14AM 11 AND ALL THAT'S YET TO BE DONE. AND SO WE THOUGHT IT MADE MORE
10:14AM 12 SENSE, INSTEAD OF WASTING THE RESOURCES OF THE PARTIES TO--TO
10:14AM 13 COME TO GRIPS WITH THIS POINT, WITH THIS FACT, AND NOT DO THE
10:14AM 14 FINAL JOINT PRETRIAL ORDER, USE THURSDAY AS A SCHEDULING
10:15AM 15 OPPORTUNITY, AND FIGURE OUT WHEN REALISTICALLY WE CAN GET THIS
10:15AM 16 CASE ON TRACK, WHEN IT CAN REALISTICALLY BE TRIED, YOU KNOW,
10:15AM 17 GIVING THE COURT THE TIME THAT IT FAIRLY NEEDS TO RESOLVE THESE
10:15AM 18 ISSUES.

10:15AM 19 THE COURT: OKAY. THANK YOU, MR. SIEBMAN.

10:15AM 20 MR. KENDALL?

10:15AM 21 MR. KENDALL: THANK YOU, YOUR HONOR. I'M GLAD AT
10:15AM 22 LEAST THE REAL DEAL HAS BEEN ARTICULATED HERE. WHAT'S GOING
10:15AM 23 ON IS BICKEL & BREWER--BILL BREWER ENTERED THIS CASE THIS LAST
10:15AM 24 SUMMER, AND WHAT IT'S REALLY ALL ABOUT IS TRYING TO PUSH THIS
10:15AM 25 TRIAL DATE OFF BECAUSE, AS I UNDERSTAND IT, MR. BREWER IS GONNA

10:15AM 1 BE THE PRIMARY PERSON COMING IN AT THE ELEVENTH HOUR WHO IS
10:15AM 2 ACTUALLY GONNA TRY THIS LAWSUIT. THAT'S WELL AND GOOD. THE
10:15AM 3 DEFENDANTS CAN HAVE WHOEVER THEY WANT IN THE ROOM DOING IT,
10:15AM 4 BUT WE SHOULD NOT BE PUNISHED FOR THAT DECISION.

10:15AM 5 WITH REGARD TO--LET ME JUST MAKE THIS POINT. WHAT
10:15AM 6 WE'RE DEALING WITH NOW, THE ORDER YOU SIGNED, THE LIVE ORDER
10:15AM 7 OF NOVEMBER 4, WAS AGREED, READING THAT WORD IN THE KEY OF G.
10:16AM 8 NOTHING THAT'S BEEN TALKED ABOUT HERE WAS UNKNOWN TO EVERYONE
10:16AM 9 INVOLVED, YOU KNOW, JUST A COUPLE OF WEEKS AGO WHEN THE MATTERS
10:16AM 10 WERE NEGOTIATED AND SUBMITTED TO THE COURT FOR APPROVAL, WHICH
10:16AM 11 THE COURT DID.

10:16AM 12 WITH REGARD TO WHAT'S ACTUALLY IN THE LETTER THAT
10:16AM 13 YOU HAVE BEFORE YOU, THESE MATTERS THAT ARE IN DISPUTE, BE
10:16AM 14 THEY THE DAUBERT MOTIONS, BE THEY THE MOTIONS IN LIMINE, BE
10:16AM 15 THEY EVEN THE DAMAGE EXPERT AS WELL AS THE MOTION FOR SUMMARY
10:16AM 16 JUDGMENT, ALL THESE MATTERS CAN BE RESOLVED AT OR NEAR THE TIME
10:16AM 17 OF TRIAL. WE ARE PERFECTLY CONTENT TO GO FORWARD.

10:16AM 18 NOW, WITH REGARD TO THOSE DATES, WE HAVE NO PROBLEM
10:16AM 19 PUSHING--EVEN DOING AWAY WITH THURSDAY'S GET-TOGETHER AND
10:16AM 20 PUSHING THE PRETRIAL ORDER MAYBE UNTIL EVEN EARLY JANUARY,
10:16AM 21 IF NEED BE. THE DEAL WE HAVE TO DIE ON IS THAT JANUARY 20TH
10:16AM 22 TRIAL SETTING. AND I WOULD ARGUE TO YOU--WELL, LET'S, TAKE FOR
10:17AM 23 INSTANCE, CLAIMS CONSTRUCTION, MARKMAN. LET'S NOT FORGET WHAT
10:17AM 24 THAT IS. THAT WAS SOMETHING UNTIL MARKMAN THAT WAS A JURY
10:17AM 25 ISSUE. AND COURTS CAN GIVE US A MARKMAN RULING AT THE TIME OF

10:17AM 1 TRIAL, IF NEED BE. AND SO WHAT I WOULD SUGGEST TO YOU IS THAT
10:17AM 2 EVERYTHING THAT IS BEING TALKED ABOUT IN THE LETTER AND HERE ON
10:17AM 3 THIS TELEPHONE CALL ARE MATTERS THAT CAN BE RESOLVED AS WE PUSH
10:17AM 4 TOWARD TRIAL ON JANUARY 20.

10:17AM 5 AND THIS CASE HAS BEEN--I WOULD SUGGEST TO YOU--IF
10:17AM 6 PAST EXPERIENCE IS ANY INDICATOR OF WHAT'S LIKELY TO HAPPEN IN
10:17AM 7 THE FUTURE, I WOULD SUGGEST FOR JUDICIAL ECONOMY'S SAKE THAT
10:17AM 8 MAYBE WE'RE GETTING CLOSE TO THE TIME WHERE THE MOTION PRACTICE
10:17AM 9 MUST END AND THE TRIAL BEGIN. AND WE DON'T HAVE A PROBLEM--
10:17AM 10 AS LONG AS WE KEEP OUR JANUARY 20 TRIAL DATE--REACHING ANY
10:17AM 11 COMPROMISE THE COURT BELIEVES IS FAIR BOTH FOR THE DEFENDANTS'
10:18AM 12 CONCERNS AS WELL AS THE COURT'S SCHEDULE AND THE COURT'S TIME.

10:18AM 13 ONE THING ELSE THAT I WOULD REQUEST AND MAYBE SUGGEST
10:18AM 14 TO THE COURT, THAT--WELL, HERE'S WHAT I WOULD SUGGEST AS A
10:18AM 15 COMPROMISE: KEEP THE DATES WE AGREED ON TWO WEEKS AGO. NOTHING
10:18AM 16 NEW HAS HAPPENED SINCE THEN.

10:18AM 17 AND WITH REGARD TO RULINGS, I'M QUITE SURE, LIKE
10:18AM 18 MOST JUDGES, YOU ARE GONNA RULE WHEN YOU HAVE TIME TO RULE.
10:18AM 19 BUT I WOULD SUGGEST TO YOU WITH WHAT YOU'VE GOT OUT THERE,
10:18AM 20 FRANKLY, ON THE MOTIONS FOR SUMMARY JUDGMENT ON DAMAGES IT MAY
10:18AM 21 BE QUICKER FOR JUDICIAL ECONOMY JUST TO TRY THE THING AND RULE
10:18AM 22 ON THESE MATTERS AT THE TIME OF THE TRIAL AS WE GO--GO THROUGH
10:18AM 23 IT. THAT MIGHT BE QUICKER THAN TAKING THE TIME NECESSARY TO
10:18AM 24 MAKE THESE RULINGS AND THEN GO FORWARD. A LOT OF COURTS WILL
10:18AM 25 DELAY RULING ON A MARKMAN OR MAKE A QUICK MARKMAN BOTH UNDER

10:19AM 1 THEORIES OF WANTING TO FOSTER SETTLEMENT. SOME--SOME COURTS
10:19AM 2 TAKE THE POSITION, "WELL, YOU KNOW, IF I RULE ON IT QUICKLY,
10:19AM 3 THAT HELPS FACILITATE SETTLEMENT BECAUSE IT GIVES CLEAR
10:19AM 4 GUIDANCE" AND/OR WAIT TILL THE LAST MINUTE TO CREATE ENOUGH
10:19AM 5 UNCERTAINTY THAT THERE'S MORE LIKELIHOOD--BUT MAKE NO MISTAKE
10:19AM 6 ABOUT IT, A MARKMAN RULING IS FOR THE JURY'S BENEFIT. THAT CAN
10:19AM 7 BE MADE DURING THE COURSE OF THE TRIAL. IN FACT, I MEAN I--

10:19AM 8 THE COURT: YEAH, BUT DOESN'T IT ALSO HELP YOU
10:19AM 9 PREPARE FOR TRIAL? I MEAN TAILOR YOUR EVIDENCE FOR TRIAL?

10:19AM 10 MR. KENDALL: IT CAN. IT CAN. AND ALL I'M SAYING
10:19AM 11 TO YOU IS WE'RE CONTENT TO GO FORWARD IN WHATEVER TIME YOU WANT
10:19AM 12 TO ALLOT US TO TRY THIS CASE. OUR CLIENTS WANT RESOLUTION AND
10:19AM 13 WE WANT TO MOVE FORWARD.

10:19AM 14 BUT WHAT I WAS GONNA SUGGEST TO YOU IS THE
10:19AM 15 PLAINTIFFS WOULD REQUEST THE COURT--WE WOULD LIKE TO GO BACK TO
10:19AM 16 JUDGE FAULKNER IN EARLY JANUARY. AND NOT THAT I COULD TELL YOU
10:20AM 17 AS AN OFFICER OF THE COURT WITH ANY HIGH DEGREE OF CONFIDENCE
10:20AM 18 THAT THAT EXERCISE MIGHT PROVE FRUITFUL, BUT AT LEAST BY THAT
10:20AM 19 TIME EVERYONE WILL HAVE A REAL CLEAR PICTURE OF WHAT WE'RE
10:20AM 20 DEALING WITH AND PERHAPS SAVE THE COURT SOME TIME THERE.

10:20AM 21 THE COURT: ALL RIGHT.

10:20AM 22 MR. KENDALL: WITH REGARD TO ALL THE THINGS
10:20AM 23 COMPLAINED OF IN THE LETTER, THE ONLY STRONG, HARD POSITION WE
10:20AM 24 TAKE IS, JUDGE, WE DON'T WANT TO LOSE OUR TRIAL SETTING AND WE
10:20AM 25 THINK THAT IS WHAT WILL BRING THIS CASE TO A HEAD. AND REALLY,

10:20AM 1 WHEN YOU GO THROUGH IT, MOTIONS IN LIMINE, THEY CAN BE RULED
10:20AM 2 ON THE DAY OF, THE DAUBERT MOTIONS AS WELL. YOU KNOW, THE
10:20AM 3 LIKELIHOOD OF ONE OF THOSE BEING GRANTED, I MEAN THOSE AREN'T
10:20AM 4 GRANTED VERY OFTEN IN CASES OF THIS MAGNITUDE WITH THE KIND
10:20AM 5 OF LAWYERING YOU'VE GOT GOING ON HERE.

10:20AM 6 THE SAME THING--I'VE ALREADY MADE MY ARGUMENT ABOUT
10:20AM 7 THE CLAIM CONSTRUCTION. AND AS I SAID, THE MOTIONS FOR SUMMARY
10:21AM 8 JUDGMENT ON THE DAMAGE ISSUES, I MEAN THAT'S, ONCE AGAIN, YOU
10:21AM 9 KNOW, X DOLLARS, Y DOLLARS.

10:21AM 10 AND AGAIN I WANT TO STRESS THESE ARE AGREED UPON.
10:21AM 11 AND WHAT'S REALLY GOING ON HERE IS A SEEKING OF DELAY OF THE
10:21AM 12 TRIAL SETTING. AND THAT IS SOMETHING THAT WE REALLY STRONGLY
10:21AM 13 HOPE THAT THE COURT WILL NOT ENGAGE IN, AND PUSH US TO TRIAL.
10:21AM 14 PLAINTIFFS ARE READY TO GO FORWARD. WE ARE READY TO TRY THE
10:21AM 15 LAWSUIT, IF NEED BE, AND BRING THIS THING TO A CONCLUSION ONE
10:21AM 16 WAY OR ANOTHER. AND WE WOULD REQUEST THAT THE COURT ORDER US
10:21AM 17 TO GO BACK TO JUDGE FAULKNER AND SEE IF WE HAVE A CHANCE OF
10:21AM 18 RESOLVING THIS SHORT OF TAKING A WEEK OR TWO OF YOUR TIME.

10:21AM 19 THE COURT: ALL RIGHT. NOW, BEFORE YOU GO BACK
10:21AM 20 TO JUDGE FAULKNER, THOUGH, YOU NEED MY CLAIM CONSTRUCTION,
10:21AM 21 I ASSUME. OR AT LEAST THAT WOULD HELP, CERTAINLY.

10:22AM 22 MR. KENDALL: MAY I BE HEARD ON THAT?

10:22AM 23 THE COURT: SURE.

10:22AM 24 MR. KENDALL: WELL, AS I SAID IN MY ARGUMENT,
10:22AM 25 THERE'S TWO SCHOOLS OF THOUGHT ON THAT. ONE IS, IF WE DON'T

10:22AM 1 HAVE IT, THERE'S ENOUGH UNCERTAINTY THERE ABOUT WHAT YOU ARE
10:22AM 2 GONNA DO THAT IT MAY FOSTER SETTLEMENT OR, IF WE HAVE IT, THEN
10:22AM 3 OBVIOUSLY WE WILL HAVE A CLEAR PICTURE. BUT, AGAIN, JUDGE, I'M
10:22AM 4 QUITE SURE THIS IS NOT THE ONLY CASE ON YOUR DOCKET AND NOT THE
10:22AM 5 ONLY THING YOU HAVE TO DO IS SIT AROUND, YOU KNOW, WATCHING THE
10:22AM 6 COMPUTER FOR THE NEXT RAYTHEON MOTION, RAYTHEON-INDIGO MOTION.

10:22AM 7 THE COURT: THAT IS TRUE.

10:22AM 8 MR. KENDALL: AND SO, YOU KNOW, I WOULD HOPE THAT
10:22AM 9 WE COULD SETTLE THE CASE AND SAVE US TIME, THE DEFENDANTS TIME,
10:22AM 10 AND SAVE YOU TIME AND EXPENSE BY GOING BACK IN EARLY JANUARY.

10:22AM 11 THE COURT: OKAY.

10:22AM 12 MR. KENDALL: I REALLY BELIEVE, JUDGE, THAT THIS
10:22AM 13 THING IS GONNA CONTINUE AS IT HAS THE LONGER WE PUT THE TRIAL
10:22AM 14 OFF AND JUST--WE'RE REQUESTING BRING THIS THING TO A HEAD AND
10:22AM 15 PUT US ALL OUT OF OUR MISERY AND LET'S TRY THIS THING IF WE
10:22AM 16 HAVE TO.

10:23AM 17 THE COURT: OKAY.

10:23AM 18 MR. SIEBMAN: YOUR HONOR, CLYDE SIEBMAN. MAY I
10:23AM 19 RESPOND?

10:23AM 20 THE COURT: SURE. YEAH, GO AHEAD.

10:23AM 21 MR. SIEBMAN: THE PROBLEM WITH WHAT MR. KENDALL
10:23AM 22 IS SUGGESTING IS THAT WE'VE BEEN TRYING TO TAKE THEIR DAMAGE
10:23AM 23 EXPERT'S DEPOSITION SINCE I THINK SEPTEMBER. SOMEONE CORRECT
10:23AM 24 ME IF I'M WRONG. BUT SINCE SEPTEMBER WE'VE BEEN TRYING TO TAKE
10:23AM 25 THIS GENTLEMAN'S DEPOSITION. AND IT'S BEEN A LITANY OF EXCUSES

10:23AM 1 ON WHY WE CAN'T TAKE THEIR DAMAGES EXPERT'S DEPOSITION,
10:23AM 2 MR. BRADDOCK.

10:23AM 3 THE COURT: ALL RIGHT. IS THERE A MOTION ON THAT?

10:23AM 4 MR. SIEBMAN: NO, WE'VE BEEN TRYING TO WORK WITH THE
10:23AM 5 SCHEDULE, TO WORK WITH OPPOSING COUNSEL TO GET THAT DEPOSITION
10:23AM 6 TAKEN. I MEAN, FIRST, I THINK HE WAS ILL; THEN HE HAD AN
10:23AM 7 ILLNESS IN THE FAMILY; THEN HE HAD SOME SCHEDULING PROBLEMS.
10:23AM 8 AND WE'VE BEEN TRYING TO WORK WITH THEM TO GET THIS DEPOSITION
10:23AM 9 TAKEN. AND THAT'S THE REASON THAT THIS SCHEDULE REALLY HAS
10:23AM 10 BEEN ROLLING IS BECAUSE OF--AND EVERYBODY IS WORKING TOGETHER.
10:23AM 11 I MEAN THERE'S A TREMENDOUS AMOUNT OF WORK TO DO IN THIS CASE,
10:23AM 12 AND ALTHOUGH, YOU KNOW, THERE HAVE BEEN A LOT OF CONTENTIOUS
10:24AM 13 ISSUES IN THE CASE, IN SOME RESPECTS WE'VE BEEN TRYING TO WORK
10:24AM 14 TOGETHER. AND IN THAT REGARD WE'VE BEEN WORKING WITH THEM TO
10:24AM 15 TRY TO GET MR. BRADDOCK'S DEPOSITION FOR A LONG, LONG TIME
10:24AM 16 AND UNTIL WE'RE NOW TO THE POINT WHERE THEY SAY HE CAN'T BE
10:24AM 17 AVAILABLE UNTIL MID-DECEMBER. THAT'S THE REASON THAT THE--THAT
10:24AM 18 THE--THE EXPERT STUFF HAS BEEN PUSHED INTO DECEMBER AFTER THE
10:24AM 19 JOINT PRETRIAL DATE.

10:24AM 20 THE PROBLEM WITH THAT NOW IS THAT THERE IS--WE
10:24AM 21 BELIEVE--WE'RE GONNA PRESENT TO THE COURT A VERY SERIOUS
10:24AM 22 DISPOSITIVE MOTION ON DAMAGES THAT WE CAN'T FILE UNTIL WE GET
10:24AM 23 THIS EXPERT'S DEPOSITION. AND THE COURT IS GOING TO HAVE TO
10:24AM 24 HAVE A REASONABLE AMOUNT OF TIME TO ADDRESS THAT. IT REALLY--
10:24AM 25 SOMETHING WAS--I WAS REMINDED OF SOMETHING THAT MR. CUNNINGHAM

10:24AM 1 SAID IN ONE OF THE FIRST HEARINGS THAT WE HAD IN THIS CASE. I
10:24AM 2 THOUGHT IT WAS ODD AT THE TIME, AND NOW IT'S MAKING MORE SENSE
10:25AM 3 TO ME. HE MADE THE COMMENT TO THE COURT THAT THIS CASE WAS
10:25AM 4 REALLY JUST AS SIMPLE AS A DOG-BITE CASE. AND I THINK THAT'S
10:25AM 5 THE WAY THEY WANT TO TRY IT. THEY REALLY--THEY DON'T WANT
10:25AM 6 TO TRY THIS CASE IN AN ORDERLY FASHION AFTER IT'S BEEN FULLY
10:25AM 7 PREPARED AND EVERYONE HAS HAD A FULL OPPORTUNITY TO PRESENT
10:25AM 8 THEIR MOTIONS AND PRESENT THIS CASE AS YOU WOULD NORMALLY A
10:25AM 9 PATENT CASE. THEY SIMPLY WANT TO--TO PRESENT THEIR ARGUMENTS
10:25AM 10 TO A JURY AND SEE WHAT STICKS. AND THAT WOULD BE AN EXTREME
10:25AM 11 INJUSTICE TO THE DEFENDANTS IN THIS CASE WHERE THE PLAINTIFFS
10:25AM 12 ARE SEEKING MILLIONS AND MILLIONS OF DOLLARS IN DAMAGES ON
10:25AM 13 THEORIES THAT WE THINK WILL--WILL NOT HOLD WATER.

10:25AM 14 THE COURT: ALL RIGHT. MR. SIEBMAN, WHAT DO YOU
10:25AM 15 THINK THE COURT NEEDS TO RULE ON RIGHT NOW IN ORDER TO HELP THE
10:25AM 16 DEFENDANTS MOVE FORWARD WITH THE CASE AND TO GET READY FOR ANY
10:26AM 17 FURTHER MEDIATION WITH JUDGE FAULKNER?

10:26AM 18 MR. SIEBMAN: I THINK THE MARKMAN ORDER IS EXTREMELY
10:26AM 19 IMPORTANT.

10:26AM 20 THE COURT: YEAH. OKAY.

10:26AM 21 MR. SIEBMAN: I THINK THE MOTION--THE PLAINTIFF'S
10:26AM 22 MOTION TO EXPAND THEIR INFRINGEMENT CONTENTIONS IS EXTREMELY
10:26AM 23 IMPORTANT. THEY'RE ATTEMPTING AT THIS LATE DATE TO EXPAND
10:26AM 24 THEIR INFRINGEMENT CONTENTIONS IN THE CASE. AND IF YOU THINK
10:26AM 25 BACK TO WHAT MR. KENDALL JUST SUGGESTED, HE SUGGESTED TO YOU

10:26AM 1 THAT WE SHOULD BE READY TO GO IN ABOUT SIX WEEKS ON A CASE
10:26AM 2 WHERE WE DON'T EVEN KNOW YET WHAT THE PLAINTIFF'S PATENT
10:26AM 3 INFRINGEMENT CONTENTIONS ARE IN ADDITION TO THE--TO THE
10:26AM 4 CLAIM CONSTRUCTION. SO I THINK THOSE TWO THINGS ARE--

10:26AM 5 THE COURT: OKAY.

10:26AM 6 MR. SIEBMAN: --EXTREMELY IMPORTANT. BUT CAN I
10:26AM 7 ALSO ASK FOR INPUT FROM MY TEAM? BECAUSE THAT'S A PRETTY BROAD
10:26AM 8 QUESTION.

10:26AM 9 MR. STEINBERG: YOUR HONOR, THIS IS BOB STEINBERG,
10:26AM 10 IF I COULD ADD TO THAT.

10:26AM 11 THE COURT: ALL RIGHT.

10:26AM 12 MR. STEINBERG: YOUR HONOR, THERE IS A REAL
10:26AM 13 PRACTICAL TIMING ISSUE HERE, PARTICULARLY WITH REGARD TO THE
10:27AM 14 MARKMAN RULING AND THE PIC. THE MARKMAN RULING WILL ENABLE
10:27AM 15 BOTH PARTIES, ACTUALLY, TO SUPPLEMENT THEIR NEW ARGUMENTS BASED
10:27AM 16 ON WHAT THOSE CONSTRUCTIONS TURN OUT TO BE. AND THAT WILL
10:27AM 17 TRIGGER PROBABLY ADDITIONAL DISCOVERY BECAUSE THOSE SUPPLEMENTAL
10:27AM 18 REPORTS WILL REQUIRE FURTHER INQUIRY.

10:27AM 19 IN ADDITION, YOUR RULING ON THE PICS, ADDING NEW
10:27AM 20 PRODUCTS THAT WEREN'T IN THE CASE, THIS MOTION FOR LEAVE TO
10:27AM 21 ADD THESE NEW PARTS AND THEORIES TO THE CASE WAS PROVIDED ONLY
10:27AM 22 WHEN THE PARTIES WERE ACTUALLY EXCHANGING EXPERT REPORTS. SO
10:27AM 23 DEFENDANTS DID NOT HAVE AN OPPORTUNITY TO ADDRESS THE ISSUES
10:27AM 24 CONCERNING THESE NEW ALLEGATIONS AND THEORIES, FRANKLY, THAT
10:27AM 25 WERE IN THE NEW PICS. SO AGAIN THERE WE ALSO WILL PROBABLY

10:27AM 1 HAVE ADDITIONAL INFORMATION TO SUPPLEMENT IN THE REPORT.

10:27AM 2 NOW, ALL OF THAT IN COMBINATION WITH THE TIMING TO
10:28AM 3 FILE PROBABLY SUBSTANTIVE AND DISPOSITIVE MOTIONS FOR SUMMARY
10:28AM 4 JUDGMENT BASED ON THE NEW PICS AND THE CLAIM CONSTRUCTIONS
10:28AM 5 WILL PUSH THE TIMELINE WELL BEYOND JANUARY 20TH, PRACTICALLY
10:28AM 6 SPEAKING.

10:28AM 7 SO WHILE I AGREE IT WOULD BE VERY HELPFUL FOR US,
10:28AM 8 BOTH PARTIES, TO HAVE THE CONSTRUCTION NOW, I DON'T SEE HOW
10:28AM 9 THAT DATE FOR THE PATENT SIDE OF THE CASE IN PARTICULAR CAN
10:28AM 10 BE MAINTAINED AT THIS TIME.

10:28AM 11 MR. KENDALL: YOUR HONOR, JOE KENDALL. MAY I BE
10:28AM 12 HEARD ON THESE ISSUES?

10:28AM 13 THE COURT: YES, BUT, YOU KNOW--I'LL BE HAPPY TO
10:28AM 14 HEAR FROM YOU, MR. KENDALL, BUT I DON'T KNOW IF THIS IS REALLY
10:28AM 15 GONNA HELP ME, BECAUSE YOU ALL KNOW SO MUCH MORE ABOUT THE
10:28AM 16 DETAILS ABOUT WHERE YOU ARE IN THE CASE AND I DON'T. YOU KNOW,
10:28AM 17 FROM MY STANDPOINT, IT'S JUST A MATTER OF: WHAT DO I ADDRESS
10:29AM 18 NEXT ON MY DOCKET? AND THERE'S ALWAYS SOMETHING DEMANDING
10:29AM 19 ATTENTION. I WANT TO--I WANT TO GIVE ATTENTION TO THIS CASE.

10:29AM 20 AND I'LL JUST TELL YOU, HERE'S MY SITUATION: I CAN'T
10:29AM 21 DO MUCH MORE ON THIS CASE IN THE MONTH OF NOVEMBER, LOOKING AT
10:29AM 22 MY SCHEDULE. I JUST FINISHED A TRIAL YESTERDAY AND I CAN TELL
10:29AM 23 YOU SEPTEMBER, OCTOBER, NOVEMBER HAVE ALL BEEN VERY BUSY WITH
10:29AM 24 TRIALS AND SENTENCINGS AND MOTION WORK.

10:29AM 25 I HAVE--AFTER WE HANG UP FROM THIS CALL, I'VE GOT TO

10:29AM 1 GET READY FOR A CLE PROGRAM TOMORROW THAT I HAVE GOT TO BE IN.

10:30AM 2 THEN I HAVE 12 SENTENCINGS ON FRIDAY AND I HAVE A

10:30AM 3 NUMBER OF SENTENCINGS NEXT WEEK BEFORE THANKSGIVING.

10:30AM 4 SO THAT PUTS ME INTO DECEMBER, WHEN I HAVE FINAL

10:30AM 5 PRETRIALS ON MONDAY, THE 1ST, AND THEN I HAVE FOUR CRIMINAL

10:30AM 6 CASES SET FOR JURY TRIAL BEFORE CHRISTMAS. HOPEFULLY SOME OF

10:30AM 7 THOSE WILL PLEA. I JUST DON'T KNOW. AND HOPEFULLY I'LL FIND

10:30AM 8 SOME TIME AROUND THE HOLIDAYS TO WORK ON THIS.

10:30AM 9 BUT WHAT I'M HOPING TO DO IS GET THE CLAIM-

10:30AM 10 CONSTRUCTION RULING TO YOU IN DECEMBER, AND ALSO A RULING ON

10:30AM 11 DOCKET ENTRY 66, WHICH IS THE DEFENDANTS' MOTION FOR SUMMARY

10:30AM 12 JUDGMENT ON VARIOUS CLAIMS; AND DOCKET ENTRY 234, WHICH IS

10:31AM 13 DEFENDANTS' MOTION FOR SANCTIONS ON SPOILIATION; AND DOCKET

10:31AM 14 ENTRY 276, WHICH IS THE PLAINTIFF'S MOTION FOR LEAVE TO

10:31AM 15 SUPPLEMENT PATENT-INFRINGEMENT CONTENTIONS; AND THEN DOCKET

10:31AM 16 ENTRY 336, WHICH IS THE PLAINTIFF'S MOTION TO STRIKE DEFENDANTS'

10:31AM 17 ANSWER TO THE AMENDED COMPLAINT.

10:31AM 18 NOW, BEGINNING WITH DOCKET ENTRY 352, WHICH IS A

10:31AM 19 MOTION BY THE PLAINTIFF TO STRIKE TRANSCRIPT ERRATA SHEETS

10:31AM 20 OF JONATHAN KNAUTH AND VU NGUYEN, THOSE--I DON'T KNOW IF ALL

10:31AM 21 THE RESPONSES AND REPLIES HAVE COME IN YET. THAT WAS FILED

10:31AM 22 NOVEMBER 3RD. SO THERE'S A LOT OF STUFF THAT'S NEW. BUT SOME

10:31AM 23 OF THIS OLD STUFF THAT'S BEEN PENDING, I WOULD LIKE TO GET

10:31AM 24 RULINGS TO YOU AS QUICKLY AS POSSIBLE.

10:32AM 25 YOU KNOW, I WANT YOU TO KEEP WORKING ON THE CASE.

10:32AM 1 I'M READY TO TRY THE CASE IN JANUARY. I STILL HAVE THAT DATE
10:32AM 2 ON MY CALENDAR AND I HAVEN'T SCHEDULED OVER IT OR ANYTHING. I
10:32AM 3 MEAN I'VE CLEARED MY CALENDAR FOR TUESDAY, JANUARY 20TH. BUT
10:32AM 4 I KNOW THAT IT'S INHIBITING BOTH SIDES' ABILITY TO PREPARE FOR
10:32AM 5 TRIAL BECAUSE YOU DON'T HAVE MY CLAIM-CONSTRUCTION RULING AND
10:32AM 6 MY RULING ON--RULINGS ON SOME OF THESE MOTIONS THAT I JUST WENT
10:32AM 7 OVER WITH YOU.

10:32AM 8 VOICE: YOUR HONOR--

10:32AM 9 THE COURT: SO IF I GO AHEAD AND TRY TO GET THOSE
10:32AM 10 RULINGS TO YOU IN DECEMBER, THEN, I GUESS, AS YOU FILE MORE
10:32AM 11 MOTIONS, I'LL JUST HAVE TO TRY TO DO SOMETHING WITH THEM AS
10:32AM 12 THEY COME MY WAY. IT COULD BE WE WOULD GO INTO TRIAL AND I
10:33AM 13 WOULD HAVE A STACK OF MOTIONS THAT I JUST HAVEN'T GOTTEN TO.
10:33AM 14 I'M NOT SURE HOW THAT WILL PLAY OUT.

10:33AM 15 MR. SIEBMAN: YOUR HONOR, THIS IS CLYDE SIEBMAN.
10:33AM 16 IF I MIGHT ADDRESS THE COURT BRIEFLY, I THINK IF THE COURT
10:33AM 17 WILL LOOK AT THE MOST-RECENT SCHEDULE AND HAVE THE LAW CLERK
10:33AM 18 CALCULATE THE RESPONSE DATES ON THOSE MOTIONS, WHAT THE COURT
10:33AM 19 IS GONNA FIND IS THAT THE DAUBERT MOTIONS ON DAMAGES AND THE
10:33AM 20 DISPOSITIVE MOTIONS ON DAMAGES ARE GONNA BE FILED EITHER ON THE
10:33AM 21 EVE OF TRIAL OR EVEN ARE GONNA BE DUE TO BE FILED RIGHT AFTER
10:33AM 22 THE 20TH.

10:33AM 23 THE COURT: ALL RIGHT. NOW, I'M LOOKING AT MY
10:33AM 24 NOVEMBER 4TH ORDER. I THINK THAT'S WHAT YOU ARE REFERRING TO.

10:33AM 25 MR. SIEBMAN: RIGHT. I THINK IT'S THE 26TH.

10:33AM 1 DECEMBER 26TH IS THE DEADLINE FOR FILING DAUBERT MOTIONS ON THE
10:33AM 2 DAMAGE SIDE AND DISPOSITIVE MOTIONS ON DAMAGES, IF MY MEMORY IS
10:34AM 3 CORRECT.

10:34AM 4 THE COURT: I DON'T SEE THE DATE DECEMBER 26TH
10:34AM 5 ANYWHERE IN HERE.

10:34AM 6 MR. GARNER: YOUR HONOR, ROBERT GARNER FOR THE
10:34AM 7 DEFENDANTS. THIS MAY BE SOMETHING THAT WOULD BE HELPFUL.

10:34AM 8 THE COURT: OKAY.

10:34AM 9 MR. GARNER: THE SCHEDULE--IT MAY BE IN ONE OF THE
10:34AM 10 PREVIOUS ORDERS, BUT THE SCHEDULE FOR THE DAUBERT MOTION FOR
10:34AM 11 SUMMARY JUDGMENT AND LIMINES BASED ON DAMAGES WILL BE NO
10:34AM 12 EARLIER THAN SEVEN DAYS AFTER THE LAST DAMAGES EXPERT IS
10:34AM 13 DEPOSED.

10:34AM 14 THE COURT: YEAH, THAT'S WHAT I'M SEEING HERE.

10:34AM 15 MR. GARNER: RIGHT NOW THE DAMAGE EXPERT DEPOSITIONS
10:34AM 16 ARE SCHEDULED, IF WE CAN KEEP THEM, FOR DECEMBER 17TH AND 19TH.

10:34AM 17 THE COURT: OKAY. ALL RIGHT. SO THEN YOU WOULD
10:34AM 18 HAVE A WEEK AFTER THAT TO FILE DAUBERT MOTIONS AND MOTIONS IN
10:34AM 19 LIMINE.

10:34AM 20 MR. GARNER: RIGHT. WE WOULD HOPE, GIVEN THE
10:34AM 21 CHRISTMAS--

10:34AM 22 THE COURT: ALL RIGHT. AND YOU ARE SAYING THE
10:34AM 23 DEPOSITIONS OF WALTER BRADDOCK AND DANIEL SCHLAGE ARE SCHEDULED
10:34AM 24 WHEN AGAIN?

10:34AM 25 MR. GARNER: WE ARE NOW SCHEDULED FOR THE 17TH AND

10:34AM 1 THE 19TH OF DECEMBER. THIS IS STILL ROBERT GARNER SPEAKING.

10:35AM 2 THE COURT: OKAY.

10:35AM 3 MR. SIEBMAN: BEEN TRYING TO TAKE BRADDOCK'S SINCE
10:35AM 4 SEPTEMBER.

10:35AM 5 MR. CUNNINGHAM: ROSS CUNNINGHAM, YOUR HONOR.

10:35AM 6 MR. BRADDOCK HAD A DEATH IN THE FAMILY, NOT AN ILLNESS; HE HAD
10:35AM 7 TWO SURGERIES; HIS OFFICE WAS DISPLACED BY HURRICANE--I DON'T
10:35AM 8 KNOW WHAT THE NAME OF IT WAS.

10:35AM 9 VOICE: IKE.

10:35AM 10 THE COURT: OKAY.

10:35AM 11 MR. CUNNINGHAM: HE'S BEEN SUMMONSED TO TRIAL IN NEW
10:35AM 12 JERSEY ONCE AND CALIFORNIA A SECOND TIME.

10:35AM 13 THE COURT: OKAY. SO RIGHT NOW YOU'VE SCHEDULED
10:35AM 14 BRADDOCK'S DEPOSITION FOR DECEMBER 17TH AND SCHLAGE'S FOR
10:35AM 15 DECEMBER 19TH?

10:35AM 16 MR. GARNER: ROBERT GARNER. THAT IS CORRECT, YOUR
10:35AM 17 HONOR.

10:35AM 18 THE COURT: OKAY.

10:35AM 19 MR. SIEBMAN: THE POINT I WAS MAKING, YOUR HONOR,
10:35AM 20 IS THAT WITH THE PROBLEMS THAT MR. BRADDOCK HAD--AND THAT'S
10:35AM 21 RAYTHEON'S EXPERT--WITH THE PROBLEMS THAT HE HAD AND PUSHING--
10:35AM 22 AND PREVENTING--AND WE DIDN'T FILE MOTIONS WITH THE COURT
10:35AM 23 BECAUSE, I MEAN, YOU KNOW, THOSE WERE LEGITIMATE EXCUSES, I
10:35AM 24 MEAN, YOU KNOW, IT WOULD HAVE BEEN--IT WOULD HAVE BEEN--I JUST
10:36AM 25 WOULDN'T HAVE FELT GOOD; IT WOULDN'T HAVE BEEN APPROPRIATE FOR

10:36AM 1 US TO FILE MOTIONS ON THAT. IT WAS APPROPRIATE FOR US TO AGREE
10:36AM 2 THAT THOSE WERE LEGITIMATE PROBLEMS.

10:36AM 3 BUT BE THAT AS IT MAY, IT HAS FORCED US INTO A
10:36AM 4 SITUATION WHERE WE'RE NOW GETTING TO TAKE THE DAMAGE EXPERT
10:36AM 5 IN A MULTI-MILLION-DOLLAR CASE WITHIN 30 DAYS OF WHEN THE TRIAL
10:36AM 6 IS SET IN A CASE WHERE WE HAVE SERIOUS ISSUES WITH THE DAMAGE
10:36AM 7 METHODOLOGY.

10:36AM 8 AND YOU KNOW, I UNDERSTAND MR. KENDALL'S COMMENT
10:36AM 9 THAT HE JUST WANTS TO THROW THIS THING IN THE JURY BOX. BUT
10:36AM 10 THAT WOULD BE TOTALLY UNFAIR TO THE DEFENDANTS IN A CASE OF
10:36AM 11 THIS MAGNITUDE WHEN WE'VE BEEN PREVENTED, ALBEIT FOR GOOD
10:36AM 12 REASONS, FROM TAKING THE DAMAGE EXPERT IN THIS CASE IN TIME
10:36AM 13 TO--TO MAKE--YOU KNOW, IF--IF THE END RESULT IS WE CAN'T MAKE
10:37AM 14 MEANINGFUL OBJECTIONS TO THIS FELLOW BECAUSE THE COURT IS NOT
10:37AM 15 GONNA HAVE A FAIR AMOUNT OF TIME TO ADDRESS THE ISSUES, THEN
10:37AM 16 THAT WOULD BE--YOU KNOW, THAT WOULD BE TOTALLY UNFAIR TO THE
10:37AM 17 DEFENDANTS. YOU KNOW, IT'S NOT OUR FAULT THAT WE'RE--THAT
10:37AM 18 WE'RE NOT ABLE TO TAKE MR. BRADDOCK, THE DAMAGE EXPERT, UNTIL
10:37AM 19 THE END OF DECEMBER.

10:37AM 20 THE COURT: WELL, NOW, YOU WOULD HAVE THE
10:37AM 21 OPPORTUNITY TO FILE YOUR DAUBERT MOTION ON BRADDOCK NO LATER
10:37AM 22 THAN, IT LOOKS LIKE, DECEMBER 24TH, RIGHT, SEVEN DAYS AFTER
10:37AM 23 12/17?

10:37AM 24 MR. SIEBMAN: RIGHT. I SUPPOSE THAT'S RIGHT. I
10:37AM 25 THOUGHT IT WAS THE 26TH, BUT IT MAY BE THE 24TH.

10:37AM 1 VOICE: IT'S THE 26TH, YOUR HONOR.

10:37AM 2 THE COURT: OKAY. ALL RIGHT.

10:37AM 3 MR. KENDALL: YOUR HONOR, THIS IS JOE KENDALL. MAY
10:37AM 4 I BE HEARD NOW?

10:37AM 5 THE COURT: OKAY. GO AHEAD.

10:37AM 6 MR. KENDALL: THIS BUSINESS ABOUT THIS IS SOME KIND
10:37AM 7 OF COMPLICATED DOG-BITE CASE, ALL I CAN TELL YOU IS YOU CAN
10:37AM 8 PROBABLY DO THE SAME THING IN ELECTRONIC FORMAT. I'M KIND OF
10:37AM 9 AN OLD-SCHOOL PAPER GUY. I LIKE TO READ PAPER. I'M LOOKING
10:37AM 10 ACROSS THE ROOM HERE AT AN ENTIRE SHELF FULL OF DEAD TREES THAT
10:38AM 11 HAVE BEEN GENERATED IN THIS CASE. SO TO SUGGEST THE NOTION
10:38AM 12 THAT THIS THING HASN'T BEEN FULLY LITIGATED AND IT HASN'T BEEN
10:38AM 13 LITIGATED AD NAUSEAM IS JUST ERRONEOUS.

10:38AM 14 WITH REGARD TO BRADDOCK'S MOTION--OR THE MOTION WITH
10:38AM 15 REGARD TO BRADDOCK, THAT THING CAN BE RIPE--IF YOU CAN SHORTEN
10:38AM 16 THE TIME ON US, WE'LL RESPOND TO WHATEVER THEY FILE ABOUT HIM
10:38AM 17 REAL QUICKLY. AND IT WOULD PROBABLY TAKE THE COURT HOWEVER
10:38AM 18 QUICK THE COURT CAN READ 10 TO 20 PAGES TO FIGURE THIS OUT.
10:38AM 19 THIS IS NOT ROCKET SCIENCE.

10:38AM 20 AND ONCE AGAIN--AND I FORGET NOW WHICH DEFENSE
10:38AM 21 LAWYER, IT WASN'T MR. SIEBMAN, BUT ONE CHIMED IN--AND THIS IS
10:38AM 22 VERY, VERY TELLING, WHEN HE SAID--AND YOU CAN GO BACK IN THE
10:38AM 23 RECORD AND LOOK--ONE OF THESE GENTLEMEN SAID, "OH, YES, AND
10:38AM 24 ONCE YOU ISSUE YOUR MARKMAN RULING, THAT WILL GENERATE
10:38AM 25 ADDITIONAL MOTIONS THAT WE WILL NEED TO FILE." AND SO WE SEE

10:39AM 1 THIS--AND WE--YOU KNOW, WE WANT TO BE PREPARED AS WELL AND WE
10:39AM 2 WANT THEM TO BE PREPARED AS WELL AND YOU BEST BELIEVE WE'RE NOT
10:39AM 3 GONNA GO UP AND THROW A BUNCH OF STUFF AGAINST THE WALL AND
10:39AM 4 HOPE THAT IT STICKS. BUT THIS IS A PRINCETON DEFENSE, DELAY,
10:39AM 5 DELAY, DELAY. WE JUST WANT TO GO TO TRIAL ON JANUARY 20TH,
10:39AM 6 WE WOULD LIKE TO MEDIATE BEFORE THEN IF THERE'S A CHANCE TO
10:39AM 7 SETTLE. IT WILL BE FAIRLY CLEAR TO ALL CONCERNED WHAT THE LAY
10:39AM 8 OF THE LAND IS BY EARLY JANUARY. AND THE HOLIDAYS WILL BE
10:39AM 9 OVER. THIS IS A BIG-ENOUGH CASE, THERE ARE ENOUGH LAWYERS
10:39AM 10 INVOLVED, A COUPLE OF WEEKS, TWO TO THREE WEEKS THERE WITH
10:39AM 11 PEOPLE WHO HAVE BEEN LIVING WITH THIS FOR A YEAR THAT DON'T
10:39AM 12 REALLY NEED TO GO OUT AND REINVENT THE WHEEL, THERE IS MORE
10:39AM 13 THAN ADEQUATE TIME TO TRY THIS CASE.

10:39AM 14 AND ONCE AGAIN, YOUR HONOR, I WOULD JUST SUGGEST TO
10:39AM 15 YOU THAT IF THE TRIAL SETTING IS PUSHED YOU ARE JUST GONNA HAVE
10:39AM 16 MORE DOCKET ENTRIES AND IT'S JUST GONNA KEEP GOING UNTIL YOU
10:40AM 17 PUT AN END TO IT.

10:40AM 18 THE COURT: OKAY.

10:40AM 19 MR. SIEBMAN: YOUR HONOR, I DON'T THINK IT'S FAIR
10:40AM 20 TO SUGGEST THAT THE DEFENDANTS ARE DELAYING. IT'S BEEN
10:40AM 21 MR. BRADDOCK'S SCHEDULE THAT'S BEEN THE TRUE IMPEDIMENT, AND
10:40AM 22 THAT'S THE PLAINTIFF'S EXPERT. SO...

10:40AM 23 THE COURT: ALL RIGHT. SO, MR. SIEBMAN, WHAT--OTHER
10:40AM 24 THAN BRADDOCK'S DEPOSITION AND SCHLAGE--AND I DON'T KNOW IF I'M
10:40AM 25 PRONOUNCING HIS NAME CORRECTLY, I'M SURE I'M NOT--OTHER THAN

10:40AM 1 THOSE TWO DEPOSITIONS--AND BY THE WAY, THOSE ARE BOTH DAMAGES
10:40AM 2 EXPERTS FOR THE PLAINTIFF, MR. KENDALL?

10:40AM 3 MR. KENDALL: YES. NO, NOT SCHLAGE. HE'S THE
10:40AM 4 DEFENDANTS', AS I UNDERSTAND IT.

10:40AM 5 THE COURT: OKAY. HE'S YOUR EXPERT, MR. SIEBMAN,
10:40AM 6 SCHLAGE IS?

10:40AM 7 MR. SIEBMAN: THE PLAINTIFF'S AND THE DEFENDANTS'
10:40AM 8 EXPERTS HAVE BEEN PUT OFF TO WHERE THEY CAN BE TAKEN
10:40AM 9 SIMULTANEOUSLY, YOU KNOW, IN THE SAME PERIOD OF TIME.

10:40AM 10 THE COURT: OKAY. ALL RIGHT. SO SCHLAGE IS YOUR
10:40AM 11 MAN?

10:40AM 12 MR. SIEBMAN: YES. AND BRADDOCK IS THEIRS. BUT THE
10:41AM 13 REASON WE'RE AT THE END OF DECEMBER IS BECAUSE OF BRADDOCK'S
10:41AM 14 SCHEDULE.

10:41AM 15 THE COURT: YEAH. OKAY. ALL RIGHT. SO YOU NEED TO
10:41AM 16 DO THAT. AND WHAT ELSE DO YOU NEED NOW IN ORDER TO GO FORWARD?
10:41AM 17 I KNOW YOU NEED THE MARKMAN RULING, OR YOU WOULD LIKE IT, AND
10:41AM 18 YOU WOULD LIKE MY RULING ON THE MOTION--LET'S SEE--THE MOTION
10:41AM 19 FOR LEAVE TO SUPPLEMENT PATENT-INFRINGEMENT CONTENTIONS FILED
10:41AM 20 BY THE PLAINTIFF. OKAY? YOU NEED THOSE TWO THINGS. THOSE ARE
10:41AM 21 THE MOST IMPORTANT IS WHAT I'M HEARING FROM BOTH SIDES HERE.

10:41AM 22 MR. SIEBMAN: IN GOING FORWARD, THAT'S CORRECT.
10:41AM 23 OBVIOUSLY THE MOTION FOR SUMMARY JUDGMENT THAT THE DEFENDANTS
10:41AM 24 HAVE ON FILE--

10:41AM 25 THE COURT: YEAH. AND THAT'S DOCKET ENTRY 66,

10:41AM 1 RIGHT?

10:41AM 2 MR. SIEBMAN: --WOULD BE VERY IMPORTANT.

10:41AM 3 MR. CUNNINGHAM: YOUR HONOR, MR. CUNNINGHAM. THE
10:41AM 4 DEFENDANTS FILED A MOTION TO WITHDRAW DOCKET NUMBER 66 ON
10:41AM 5 NOVEMBER 3RD. THEY REPLACED IT WITH--IT WAS A PRE-DISCOVERY
10:41AM 6 MOTION FOR SUMMARY JUDGMENT ON LIMITATION. ON NOVEMBER 3RD,
10:42AM 7 THEY WITHDREW THAT MOTION FOR SUMMARY JUDGMENT AND REPLACED
10:42AM 8 IT WITH A VIRTUALLY IDENTICAL MOTION, BUT THEY THEN INCLUDED
10:42AM 9 EVIDENCE THAT CAME OUT DURING THE YEAR OF DISCOVERY.

10:42AM 10 MR. SIEBMAN: THE NUMBER HAS CHANGED, BUT THE
10:42AM 11 SUBSTANCE OF THAT MOTION IS VERY SIMILAR.

10:42AM 12 THE COURT: ALL RIGHT. IT WOULD JUST BE HELPFUL
10:42AM 13 FOR ME TO IDENTIFY WHICH NUMBER WE'RE TALKING ABOUT.

10:42AM 14 MR. SIEBMAN: IF THE COURT WOULD LIKE, WE COULD
10:42AM 15 PREPARE A LETTER AND SEND IT OVER TO THE COURT BY FIRST THING
10:42AM 16 IN THE MORNING.

10:42AM 17 THE COURT: ALL RIGHT. THAT WOULD HELP. I'M
10:42AM 18 LOOKING HERE. IT MAY BE NUMBER 357. DO YOU KNOW, KEITH?

10:42AM 19 LAW CLERK: I DON'T KNOW.

10:42AM 20 THE COURT: DO YOU RECALL A MOTION TO WITHDRAW?

10:42AM 21 LAW CLERK: I DON'T RECALL SEEING THAT.

10:42AM 22 MR. CUNNINGHAM: YOUR HONOR, MR. CUNNINGHAM. THE
10:42AM 23 DEFENDANTS FILED A MOTION ON THE--ON THE--ON THE NIGHT OF
10:42AM 24 NOVEMBER 3RD THAT WAS--THEY WITHDREW DOCKET NUMBER 66 AND
10:42AM 25 THEN IN EITHER A COMPANION MOTION OR ON THE SAME MOTION THEY

10:42AM 1 WERE ASKING TO RESET THE PAGE LIMITS ON THE TOTAL OF BRIEFING
10:43AM 2 OF 60 PAGES.

10:43AM 3 THE COURT: OKAY. THERE ARE A NUMBER OF MOTIONS
10:43AM 4 FILED ON NOVEMBER 3RD.

10:43AM 5 MR. SIEBMAN: LET ME EXPLAIN THAT, YOUR HONOR, SO
10:43AM 6 YOU'LL UNDERSTAND WHAT HAPPENED. WE FILED AN INITIAL MOTION AT
10:43AM 7 THE--AT THE BEGINNING OF DISCOVERY. THAT GOT CARRIED FORWARD.
10:43AM 8 AND SO WHAT WE DID IN NOVEMBER WAS WE FILED ANOTHER MOTION
10:43AM 9 THAT WOULD BASICALLY SUBSUME THAT INITIAL--INSTEAD OF THE COURT
10:43AM 10 HAVING TWO MOTIONS, WE PUT EVERYTHING IN THAT OLD MOTION IN THE
10:43AM 11 SECOND MOTION.

10:43AM 12 THE COURT: OKAY.

10:43AM 13 MR. SIEBMAN: WE--WE--WE INCLUDED ADDITIONAL
10:43AM 14 EVIDENCE THAT HAD BEEN LEARNED DURING DISCOVERY--

10:43AM 15 THE COURT: OKAY.

10:43AM 16 MR. SIEBMAN: --THAT WE CONTENDED SUPPORTED THE
10:43AM 17 MOTION.

10:43AM 18 THE COURT: OKAY. THEN WHAT I NEED TO DO IS NOT--SO
10:43AM 19 YOU DON'T NEED A RULING ON 66, BECAUSE YOU'VE REPLACED IT WITH
10:43AM 20 SOMETHING ELSE. AND IT LOOKS LIKE PROBABLY YOU'VE REPLACED IT
10:43AM 21 WITH 357.

10:43AM 22 MR. SIEBMAN: IS THAT CORRECT, ROB?

10:43AM 23 MR. GARNER: ROBERT GARNER, YOUR HONOR, FOR
10:43AM 24 DEFENDANTS. I DON'T HAVE THAT NUMBER IN FRONT ME, BUT IT IS
10:44AM 25 REPLACED AND IT IS NOT FULLY--IT'S NOT RIPE YET. BUT I THINK

10:44AM 1 MR. SIEBMAN'S SUGGESTION THAT WE PROVIDE YOU WITH A MORE
10:44AM 2 ORGANIZED CHART OF WHAT'S PENDING AND WHERE THINGS ARE IN
10:44AM 3 THE MORNING MIGHT BE THE BEST WAY TO GO.

10:44AM 4 THE COURT: OKAY. ALL RIGHT. I WILL--AS SOON AS I
10:44AM 5 GET THAT CHART, I WILL LOOK AT IT AND SEE, YOU KNOW, WHAT'S THE
10:44AM 6 MOST IMPORTANT HERE FOR ME TO GET GOING ON. AND I'M GOING TO
10:44AM 7 START WITH THE MARKMAN ORDER AND THE PLAINTIFF'S MOTION TO
10:44AM 8 SUPPLEMENT THEIR PATENT-INFRINGEMENT CONTENTIONS.

10:44AM 9 NOW, CAN YOU KEEP GOING FORWARD WITH WHAT'S IN THE
10:44AM 10 NOVEMBER 4TH ORDER HERE?

10:44AM 11 MR. SIEBMAN: YOUR HONOR, THERE'S A COUPLE OF THINGS
10:44AM 12 THAT WE REALLY WOULD NEED. WE--WE NEED--WHAT WE WOULD ASK FOR
10:44AM 13 WOULD BE AT LEAST ONE OR TWO DAYS ADDITIONAL ON THE JOINT FINAL
10:44AM 14 PRETRIAL ORDER. IF THE COURT IS INCLINED TO HAVE US FILE A
10:45AM 15 JOINT FINAL PRETRIAL ORDER AT THIS POINT, WE WOULD LIKE AT
10:45AM 16 LEAST A COUPLE-DAY EXTENSION ON THAT. AND THEN ALSO WE WOULD
10:45AM 17 LIKE A WEEK EXTENSION ON THE PENDING--ON THE RESPONSES OR
10:45AM 18 OPPOSITIONS THAT ARE DUE, I THINK, TODAY. IS THAT RIGHT, ROB?

10:45AM 19 MR. GARNER: THAT'S CORRECT.

10:45AM 20 VOICE: YOUR HONOR--

10:45AM 21 MR. SIEBMAN: I DON'T KNOW IF--BASED ON AN EARLIER
10:45AM 22 COMMENT, I'M NOT SURE THAT THE DEFENDANTS--I MEAN THAT THE
10:45AM 23 PLAINTIFFS WOULD BE OPPOSED TO THAT.

10:45AM 24 MR. KENDALL: YOUR HONOR, JOE KENDALL. ONCE AGAIN,
10:45AM 25 WE ARE AMENABLE TO WHATEVER WORKS FOR EVERYONE AS LONG AS WE

10:45AM 1 GET TO TRY THIS CASE JANUARY 20 AND AS LONG AS WE GET A CRACK
10:45AM 2 WITH JUDGE FAULKNER AGAIN TO SEE IF WE CAN SAVE US ALL SOME
10:45AM 3 TIME. THAT'S THE ONLY HILL WE HAVE TO DIE ON.

10:45AM 4 THE COURT: OKAY. ALL RIGHT.

10:45AM 5 NOW, AS FAR AS THE FINAL PRETRIAL ORDER, WOULD THE
10:45AM 6 FINAL PRETRIAL ORDER BE MORE HELPFUL TO THE COURT AND TO YOU
10:45AM 7 IF IT CAME TO ME AFTER I GIVE YOU MY MARKMAN RULING?

10:46AM 8 MR. GARNER: YOUR HONOR, ROBERT GARNER FOR DEFENDANTS.
10:46AM 9 THAT'S CORRECT.

10:46AM 10 MR. KENDALL: JUDGE, JOE KENDALL. I WOULD AGREE
10:46AM 11 WITH THAT.

10:46AM 12 THE COURT: OKAY. THEN--

10:46AM 13 MR. GARNER: YOUR HONOR, ROBERT GARNER. IT WOULD
10:46AM 14 ALSO BE HELPFUL IF IT CAME ALSO AFTER THE RULING ON THE
10:46AM 15 PRELIMINARY INFRINGEMENT CONTENTIONS AS WELL.

10:46AM 16 THE COURT: OKAY. OKAY. LET'S SAY THE FINAL
10:46AM 17 PRETRIAL ORDER WILL BE DUE--AND I DON'T KNOW HOW QUICK TO MAKE
10:46AM 18 THIS, BUT CAN WE SAY 10 DAYS AFTER RULINGS ON THOSE TWO THINGS?

10:46AM 19 MR. SIEBMAN: YES, YOUR HONOR. I WAS GONNA SAY 10
10:46AM 20 BUSINESS DAYS, BUT A 10-DAY RULING WOULD BE 10 BUSINESS DAYS,
10:46AM 21 SO THAT WOULD BE FINE.

10:46AM 22 THE COURT: OKAY. 10 BUSINESS DAYS AFTER MARKMAN
10:46AM 23 AND RULING ON PATENT-INFRINGEMENT CONTENTIONS.

10:47AM 24 OKAY. AS FAR AS--YOU MENTIONED SOMETHING ELSE ABOUT
10:47AM 25 SOME RESPONSES, MR. SIEBMAN, THAT YOU NEEDED ANOTHER FEW DAYS

10:47AM 1 ON OR A WEEK OR SOMETHING LIKE THAT.

10:47AM 2 MR. SIEBMAN: THERE ARE SOME OPPOSITIONS, I THINK,
10:47AM 3 ON MOTIONS THAT ARE DUE TODAY, AND WE WOULD LIKE TO EXTEND THAT
10:47AM 4 FOR A WEEK.

10:47AM 5 THE COURT: OKAY.

10:47AM 6 MR. KENDALL: WE HAVE NO OBJECTION TO THAT, YOUR
10:47AM 7 HONOR.

10:47AM 8 THE COURT: OKAY. ALL RIGHT. THOSE--I'LL GRANT
10:47AM 9 THAT REQUEST. AND I'LL PUT THIS IN A WRITTEN ORDER. SO
10:47AM 10 RESPONSES TO MOTIONS THAT ARE DUE TODAY ARE EXTENDED TO, LET'S
10:47AM 11 SEE, NOVEMBER 25TH.

10:47AM 12 OKAY. WHAT ELSE, MR. SIEBMAN?

10:47AM 13 MR. SIEBMAN: YOUR HONOR, I THINK THAT TAKES CARE
10:47AM 14 OF THE IMMEDIATE.

10:47AM 15 THE LAST COMMENT THAT I WOULD HAVE IS THAT THE MOST
10:48AM 16 IMPORTANT THING THAT WE NEED IS PROBABLY THE MOST DIFFICULT AND
10:48AM 17 THAT IS THAT WE NEED THE COURT TO HAVE AN ADEQUATE AMOUNT OF
10:48AM 18 TIME TO FULLY AND FAIRLY CONSIDER OUR OBJECTIONS TO THE DAMAGE
10:48AM 19 MODEL PRIOR TO THE TRIAL.

10:48AM 20 THE COURT: OKAY.

10:48AM 21 MR. SIEBMAN: AND, YOU KNOW, I DON'T KNOW--YOU KNOW,
10:48AM 22 I KNOW WHAT I TYPICALLY CONSIDER TO BE WHAT THE COURT NEEDS.
10:48AM 23 THE COURT KNOWS BETTER THAN I DO. BUT I THINK THAT'S THE
10:48AM 24 MOST-IMPORTANT ISSUE THAT WE HAVE THAT WOULD BE PENDING WOULD
10:48AM 25 BE--'CAUSE I THINK--IN A CASE OF THIS MAGNITUDE, I THINK IT IS

10:48AM 1 EXTREMELY IMPORTANT FOR THE JUDGE AND FOR THE COURT TO FULFILL
10:48AM 2 ITS--AND I KNOW YOU WILL, I'M NOT SUGGESTING YOU WON'T, BUT I
10:48AM 3 THINK IT IS IMPORTANT THAT YOU GIVE YOURSELF THE TIME THAT
10:48AM 4 YOU'RE TRULY GONNA NEED TO FULFILL YOUR ROLE AS A GATEKEEPER
10:48AM 5 ON THESE DAUBERT MOTIONS WITH RESPECT TO THIS DAMAGE MODEL.

10:49AM 6 THE COURT: ARE THESE MOTIONS THAT YOU HAVE ALREADY
10:49AM 7 FILED?

10:49AM 8 MR. SIEBMAN: THESE ARE MOTIONS THAT ARE REQUIRED TO
10:49AM 9 BE FILED, UNDER THE CURRENT SCHEDULE, SEVEN DAYS AFTER THESE
10:49AM 10 DAMAGE EXPERT DEPOS.

10:49AM 11 THE COURT: OKAY.

10:49AM 12 MR. SIEBMAN: AND THEREIN LIES THE REAL PROBLEM.
10:49AM 13 THEY'RE NOT GONNA BE FILED UNTIL THE END OF DECEMBER. AND,
10:49AM 14 YOU KNOW, THAT REALLY CREATES THE PROBLEM.

10:49AM 15 NOW, YOU KNOW, I HEAR MR. KENDALL TALKING ABOUT
10:49AM 16 JANUARY THE 20TH. BUT, YOU KNOW, IT MAY VERY WELL BE THAT WHAT
10:49AM 17 WE WOULD URGE THE COURT TO DO IS IF THE COURT CAN'T--AND I HAVE
10:49AM 18 A HARD TIME EVEN SAYING THIS BECAUSE I DON'T SEE HOW THE COURT
10:49AM 19 COULD HAVE THE TIME IN THAT WINDOW, BUT--BUT POSSIBLY, YOU
10:49AM 20 KNOW, WE COULD MOVE THE TRIAL DATE A SMALL AMOUNT AND--SUCH
10:49AM 21 THAT THE COURT WOULD HAVE THE TIME THAT IT NEEDS TO REVIEW
10:49AM 22 THESE GATEKEEPER MOTIONS.

10:49AM 23 MR. KENDALL: JOE KENDALL. MAY I BE HEARD, YOUR
10:49AM 24 HONOR?

10:49AM 25 THE COURT: YES.

10:49AM 1 MR. KENDALL: IT'S GONNA TAKE YOU ABOUT AS LONG AS
10:49AM 2 IT TAKES TO READ WHAT WE SUBMIT. IT'S JUST THAT--MR. SIEBMAN
10:49AM 3 IS TRYING TO MAKE SOMETHING REAL COMPLEX AND MYSTERIOUS ABOUT
10:50AM 4 THIS. AND IT IS A ROUTINE DAUBERT RULING ON A GUY WHO IS A--
10:50AM 5 THIS WON'T BE THE FIRST TIME HE'S TESTIFIED. LET ME JUST LEAVE
10:50AM 6 IT AT THAT.

10:50AM 7 THE COURT: ARE YOU TALKING ABOUT WALTER BRADDOCK?

10:50AM 8 MR. KENDALL: YES, SIR. AND SO TO SUGGEST THAT THIS
10:50AM 9 IS SOMETHING THAT'S GONNA REQUIRE TWO OR THREE WEEKS OF YOU
10:50AM 10 GOING INTO A CAVE SOMEWHERE OR GOING UP ON A MOUNTAINTOP AND
10:50AM 11 MEDITATING IS, IN OUR VIEW, NOT ACCURATE. AND ONCE AGAIN IT
10:50AM 12 COMES BACK TO WHAT I SAID WHAT, 45 MINUTES AGO NOW. THE REAL
10:50AM 13 DEAL IS THEY WANT TO DO ANYTHING OTHER THAN TRY THIS CASE ON
10:50AM 14 JANUARY 20TH. AND WE ARE AMENABLE TO CHANGING AND ALTERING
10:50AM 15 AGREED DATES AS RECENTLY AS TWO OR THREE WEEKS AGO, ON NOVEMBER
10:50AM 16 4, TO ACCOMMODATE THEM IN ANY AND EVERY WAY POSSIBLE AS LONG
10:50AM 17 AS WE PUT AN END TO THIS THING ON JANUARY 20TH ONE WAY OR THE
10:50AM 18 OTHER.

10:50AM 19 MR. SIEBMAN: YOUR HONOR, THAT MAY SOLVE THE PROBLEM.
10:50AM 20 IF THE COURT GETS THOSE MOTIONS AND THEY'RE THAT EASY TO RESOLVE
10:51AM 21 AND THE COURT RESOLVES THEM THAT QUICKLY, THEN I THINK IT CAN
10:51AM 22 BE DONE WITHIN THAT WINDOW. BUT THE THING I WANT TO MAKE SURE
10:51AM 23 WE RESERVE ON IS IF THE COURT GETS THOSE MOTIONS AND THEY ARE
10:51AM 24 AS SUBSTANTIVE AS I THINK THEY'RE GOING TO BE, THEN I THINK THE
10:51AM 25 COURT IS GONNA NEED MORE TIME. AND UNFORTUNATELY--

10:51AM 1 THE COURT: I GUESS I WON'T KNOW UNTIL I SEE THEM.

10:51AM 2 MR. SIEBMAN: YOU WON'T KNOW UNTIL YOU KNOW. I
10:51AM 3 SIMPLY WANT TO URGE THE COURT TO KEEP ITS--KEEP ITS OPTIONS
10:51AM 4 OPEN IN TERMS OF THAT TRIAL DATE, BECAUSE IT'S EXTREMELY
10:51AM 5 IMPORTANT TO THE DEFENDANTS AND OUR ABILITY TO GET A FAIR TRIAL
10:51AM 6 FOR THE COURT TO FULFILL THE ROLE OF GATEKEEPER ON THAT DAMAGE
10:51AM 7 MODEL.

10:51AM 8 THE COURT: OKAY. ALL RIGHT.

10:51AM 9 I'LL RESET THE FINAL PRETRIAL ORDER FOR 10 BUSINESS
10:51AM 10 DAYS AFTER MY MARKMAN RULING AND RULING ON THE PRELIMINARY
10:51AM 11 INFRINGEMENT CONTENTION--OR PATENT-INFRINGEMENT CONTENTION, AND
10:51AM 12 THEN EXTEND THE RESPONSE DATE FOR THE MOTIONS THAT ARE TO BE
10:52AM 13 RESPONDED TO BY TODAY, EXTEND THAT FOR ONE WEEK.

10:52AM 14 AND, LET'S SEE, AS FAR AS THURSDAY, IS THERE ANY
10:52AM 15 NEED FOR YOU TO COME ON THURSDAY?

10:52AM 16 MR. KENDALL: JOE KENDALL, YOUR HONOR. WE DON'T SEE
10:52AM 17 THAT THERE'S ANY NEED WHATSOEVER, GIVEN WHAT WE'VE TALKED ABOUT
10:52AM 18 HERE TODAY, FOR US TO DO ANYTHING THURSDAY.

10:52AM 19 THE COURT: OKAY.

10:52AM 20 MR. SIEBMAN?

10:52AM 21 MR. SIEBMAN: I TEND TO AGREE WITH THAT. DOES
10:52AM 22 ANYBODY ON MY SIDE DISAGREE WITH THAT?

10:52AM 23 VOICE: NO, THAT'S FINE, THAT'S FINE.

10:52AM 24 THE COURT: OKAY. ALL RIGHT. DO YOU WANT ME TO
10:52AM 25 RESET THURSDAY'S HEARING TO ANOTHER DATE? OR JUST GO WITH IT

10:52AM 1 THE WAY WE ARE RIGHT NOW?

10:52AM 2 MR. SIEBMAN: I THINK WE CAN GO WITH IT AS IT IS
10:52AM 3 NOW. OBVIOUSLY WE WOULD NEED A HEARING AFTER THE FINAL
10:52AM 4 PRETRIAL ORDER IS FILED. BUT THE APPROPRIATE TIME TO SCHEDULE
10:52AM 5 THAT MIGHT BE AFTER IT'S FILED.

10:52AM 6 THE COURT: OKAY. ALL RIGHT. I'LL MAKE THOSE TWO
10:53AM 7 CHANGES IN A SHORT ORDER THAT I'LL SEND OUT TO YOU RIGHT AFTER
10:53AM 8 WE HANG UP. I JUST DON'T WANT TO HANG UP UNTIL I'M SURE THAT
10:53AM 9 WE'VE COVERED EVERYTHING.

10:53AM 10 MR. STEINBERG: THERE IS ONE OTHER ISSUE, YOUR HONOR.
10:53AM 11 THIS IS BOB STEINBERG. I JUST WANT TO THROW THIS OUT. WE
10:53AM 12 DON'T HAVE TO DECIDE THIS NOW, I JUST WANT TO POINT IT OUT.
10:53AM 13 ONCE YOUR MARKMAN RULING COMES DOWN, THE CLAIMS CONSTRUCTION,
10:53AM 14 BOTH PARTIES WILL WANT TO SUPPLEMENT THEIR EXPERT REPORTS
10:53AM 15 PROBABLY TO ADDRESS THOSE CONSTRUCTIONS. AND AT THAT TIME--
10:53AM 16 OBVIOUSLY WE DON'T KNOW WHAT THEY'RE GONNA SAY AT THIS POINT.
10:53AM 17 YOU KNOW, THERE MAY BE SOME ADDITIONAL DISCOVERY NECESSARY WITH
10:53AM 18 REGARD TO THOSE REPORTS. I JUST WANT TO POINT THAT OUT AND
10:53AM 19 LEAVE IT AT THAT. IT MAY EVEN REQUIRE SOME ADJUSTMENT ON THE
10:53AM 20 SCHEDULE OTHERWISE.

10:53AM 21 THE COURT: OKAY. I'M JUST MAKING A NOTE OF WHAT
10:53AM 22 YOU JUST SAID.

10:53AM 23 MR. STEINBERG: YOUR HONOR, NORMALLY WE WOULD HAVE--
10:53AM 24 YOU KNOW, BOTH PARTIES WOULD HAVE THE OPPORTUNITY TO ADDRESS
10:53AM 25 THEIR CONTENTIONS VIS-A-VIS THEIR EXPERTS AND KNOW WHAT THEY

10:54AM 1 ARE FOR BOTH PARTIES.

10:54AM 2 MR. SIEBMAN: THE PATENT RULES THEMSELVES PROVIDE A
10:54AM 3 NUMBER OF DAYS FOR EACH PARTY TO SUPPLEMENT ON THE PATENT SIDE
10:54AM 4 WITH RESPECT TO THINGS THAT NEED TO BE SUPPLEMENTED IN THE
10:54AM 5 CONTEXT OF THE CONSTRUCTION. AND I DON'T HAVE THE RULES IN
10:54AM 6 FRONT OF ME, I DON'T REMEMBER IF IT'S 30 DAYS OR WHAT THE
10:54AM 7 NUMBER OF DAYS ARE, BUT THE PATENT RULES THEMSELVES CONTEMPLATE
10:54AM 8 CERTAIN SUPPLEMENTATION AFTER THE MARKMAN IS HANDED DOWN.

10:54AM 9 THE COURT: OKAY.

10:54AM 10 MR. KENDALL: YOUR HONOR, JOE KENDALL. ONE LAST
10:54AM 11 THING.

10:54AM 12 THE COURT: YES.

10:54AM 13 MR. KENDALL: WOULD YOU CONSIDER MY SUGGESTION
10:54AM 14 EARLIER THAT YOU ORDER US IN EARLY JANUARY TO GO BACK TO
10:54AM 15 JUDGE FAULKNER?

10:54AM 16 THE COURT: SURE. YEAH. HOW DO YOU FEEL ABOUT
10:54AM 17 THAT, MR. SIEBMAN?

10:54AM 18 MR. SIEBMAN: I DON'T THINK WE EVER HAVE AN
10:54AM 19 OBJECTION TO THAT, DO WE? IS THERE ANYBODY ON OUR SIDE THAT--
10:54AM 20 WE'VE BEEN TWICE. AND SO I WONDER: UNTIL WE HAVE A MARKMAN
10:55AM 21 RULING, DOES IT REALLY MAKE ANY SENSE TO GO BACK FOR A THIRD
10:55AM 22 TIME?

10:55AM 23 THE COURT: OKAY.

10:55AM 24 MR. KENDALL: I DON'T DISAGREE WITH THAT, YOUR HONOR.
10:55AM 25 THE ONLY THING I'M THINKING IS SOMETIME IN EARLY JANUARY, AND

10:55AM 1 AS BUSY AS JUDGE FAULKNER IS, IF WE'RE GONNA DO IT, WE NEED TO
10:55AM 2 GET ON HIS SCHEDULE NOW. AND I'M THINKING SOMETIME MAYBE THE
10:55AM 3 WEEK OF THE 5TH. IT WOULD BE WORTH OUR TIME AND, IF SUCCESSFUL,
10:55AM 4 CERTAINLY WORTH THE COURT'S TIME FOR US TO ENGAGE IN THAT
10:55AM 5 EXERCISE.

10:55AM 6 THE COURT: OKAY. SO DO YOU WANT ME TO PUT THAT IN
10:55AM 7 MY ORDER THAT I'M GOING TO SEND OUT TO YOU TODAY, TO CONTACT
10:55AM 8 JUDGE FAULKNER AND RESUME MEDIATION SAY NO LATER THAN JANUARY
10:55AM 9 9TH?

10:55AM 10 MR. KENDALL: YES, YOUR HONOR, PLAINTIFFS WOULD.

10:55AM 11 THE COURT: HOW DO YOU FEEL ABOUT THAT, MR. SIEBMAN?
10:55AM 12 AND THAT'S ASSUMING, OF COURSE, YOU HAVE RULINGS FROM ME ON--ON
10:56AM 13 THE MARKMAN ISSUES.

10:56AM 14 MR. KENDALL: YES, SIR.

10:56AM 15 MR. SIEBMAN: RIGHT. DOES ANYONE ELSE WANT TO SPEAK
10:56AM 16 TO THAT?

10:56AM 17 MR. COLLINS: THIS IS MIKE COLLINS. I THINK THAT'S
10:56AM 18 FINE. WE'LL CERTAINLY TRY TO WORK WITH THAT, ABSOLUTELY. IF
10:56AM 19 THE COURT DOESN'T HAVE TIME FOR THE MARKMAN RULINGS, WE CAN
10:56AM 20 ALWAYS ASK THE COURT TO ADJUST THAT.

10:56AM 21 THE COURT: OKAY. WELL, THANK YOU VERY MUCH. I
10:56AM 22 WILL SEND OUT AN ORDER ON WHAT WE'VE TALKED ABOUT HERE, THE
10:56AM 23 THREE THINGS. AND I PROMISE YOU I WILL TRY TO GET YOU RULINGS
10:56AM 24 AS SOON AS POSSIBLE ON THE MARKMAN ISSUE AND THE PATENT-
10:56AM 25 INFRINGEMENT CONTENTIONS AS WELL AS THERE'S A COUPLE OF OTHER

10:56AM 1 MOTIONS HERE THAT ARE RIPE. THERE ARE, I THINK, ABOUT THREE
10:56AM 2 MORE. I'LL HAVE TO GO BACK AND LOOK AT THIS MOTION FOR SUMMARY
10:56AM 3 JUDGMENT THAT'S BEEN REPLACED AND SEE--AND YOU ARE GOING TO
10:56AM 4 SEND ME SOMETHING TOMORROW, MR. SIEBMAN, RIGHT?

10:57AM 5 MR. SIEBMAN: YES, YOUR HONOR. WE'LL SEND YOU A
10:57AM 6 LIST OF WHAT WE BELIEVE ARE THE PENDING MOTIONS.

10:57AM 7 THE COURT: OKAY. WITH A COPY TO PLAINTIFF'S
10:57AM 8 COUNSEL?

10:57AM 9 MR. SIEBMAN: ABSOLUTELY.

10:57AM 10 THE COURT: OKAY.

10:57AM 11 MR. GARNER: YOUR HONOR, ROBERT GARNER. IF I CAN
10:57AM 12 JUST RECAP, I THINK YOU SAID THREE THINGS AND I JUST WANT TO
10:57AM 13 MAKE SURE. THE ITEMS IN THE ORDER WILL BE THE PRETRIAL ORDER
10:57AM 14 RESETTING--

10:57AM 15 THE COURT: RIGHT.

10:57AM 16 MR. GARNER: --THE ONE-WEEK EXTENSION ON TODAY'S
10:57AM 17 RESPONSES--

10:57AM 18 THE COURT: YES.

10:57AM 19 MR. GARNER: --THE POSTPONEMENT OF THE THURSDAY
10:57AM 20 HEARING, AND THE MEDIATION.

10:57AM 21 THE COURT: YES. YEAH, I GUESS FOUR THINGS, YEAH.

10:57AM 22 MR. GARNER: THANK YOU VERY MUCH.

10:57AM 23 THE COURT: OKAY.

10:57AM 24 MR. SIEBMAN: WE APPRECIATE YOUR TIME, YOUR HONOR.
10:57AM 25 WE KNOW WITH YOUR DOCKET THAT IT'S EXTREMELY CROWDED FOR YOU

10:57AM 1 AND YOUR LAW CLERKS.

10:57AM 2 THE COURT: WELL, THANK YOU. THANKS FOR SAYING
10:57AM 3 THAT.

10:57AM 4 OKAY. I GUESS THAT'S IT THEN. AND I'LL HANG UP
10:57AM 5 AT THIS TIME. THANK YOU VERY MUCH FOR BEING AVAILABLE.

10:57AM 6 MR. KENDALL: THANK YOU, YOUR HONOR.

10:57AM 7 MR. SIEBMAN: THANK YOU, YOUR HONOR.

10:57AM 8 THE COURT: OKAY. BYE-BYE.

10:58AM 9 MR. SIEBMAN: BYE-BYE.

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COURT REPORTER'S CERTIFICATE

12

13 I CERTIFY THAT THESE 39 PAGES CONTAIN A CORRECT TRANSCRIPT
14 FROM THE RECORD OF PROCEEDINGS.

15 DECEMBER 11, 2008.

16



18

JERRY KELLEY, CRR

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OFFICIAL COURT REPORTER

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